Supreme Court, U. S.
FILED
AUG 9 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-189

DONALD WYRICK,
Petitioner,

vs.

SANFORD THOMAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN C. DANFORTH
Attorney General

NEIL MACFARLANE
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3040

INDEX

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING CERTIORARI—

The Eighth Circuit Court of Appeals Erred in Ordering That a Writ of Habeas Corpus Be Issued for the Reason That Respondent's Defense Counsel Was Not Effective; Because Such Order Was Made by Engaging in Pure Speculation Without Any Showing of Actual Prejudice, and by Second-Guessing the Trial Strategy of the Defense Attorney 5

CONCLUSION 17

APPENDIX 1 (Order of United States District Court, Eastern District of Missouri, Eastern Division, August 6, 1975) A1

APPENDIX 2 (Opinion of United States District Court, Eastern District of Missouri, Eastern Division, August 6, 1975) A2

APPENDIX 3 (Opinion of United States Court of Appeals for the Eighth Circuit, April 28, 1976) A19

APPENDIX 4 (Petition for Rehearing or, in the Alternative, for Rehearing en Banc and Suggestions in Support Thereof) A45

APPENDIX 5 (Order of United States Court of Appeals for the Eighth Circuit, May 28, 1976) A57

APPENDIX 6 (Order of United States District Court, Eastern District of Missouri, Eastern Division, June 8, 1976) A58

APPENDIX 7 (Motion for Court to Recall Its Mandate, and to Stay Issuance of Said Mandate Pending Appellee's Application to the Supreme Court for a Writ of Certiorari) A59

APPENDIX 8 (Order of United States Court of Appeals for the Eighth Circuit, June 16, 1976) A61

CASES CITED

Beasley v. *United States*, 491 F.2d 687 (6th Cir. 1974) 16

McQueen v. *Swenson*, 498 F.2d 207 (8th Cir. 1974) 6, 12

Mengarelli v. *United States Marshal in and for District of Nevada*, 476 F.2d 617 (9th Cir. 1973) 16

United States v. *DeCoster*, 487 F.2d 1197 (D.C.Cir. 1973) 16

United States v. *Grant*, 489 F.2d 27 (8th Cir. 1973) 15

United States v. *Johnson*, 466 F.2d 1206 (8th Cir. 1972), cert. denied 409 U.S. 1111, 93 S.Ct. 923, 34 L.Ed.2d 693 15

United States ex rel. Johnson v. *Vincent*, 370 F.Supp. 379 (S.D.N.Y. 1974), reversed on other grounds 507 F.2d 1309, cert. denied ..... U.S. ....., 95 S.Ct. 1435, ... L.Ed.2d 16

United States ex rel. Walker v. *Henderson*, 492 F.2d 1311 (2d Cir. 1974), cert. denied 417 U.S. 972, 94 S.Ct. 3179, 41 L.Ed.2d 1144 16

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

DONALD WYRICK,
Petitioner,

vs.

SANFORD THOMAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Donald Wyrick, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 28, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Eastern District of Missouri, Eastern Division also is not reported and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 28, 1976. The petitioner filed a Petition for Rehearing or, in the Alternative, for Rehearing En Banc within the time period granted by the Court of Appeals following petitioner's request for extension, and said petition was denied on May 28, 1976. This petition for writ of certiorari was filed within 90 days of the latter date. This court's jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether it is proper for a federal court to issue a writ of habeas corpus ordering that a state prisoner be released without a showing that the prisoner was actually prejudiced by the failure of his counsel to render effective assistance.

2. Whether a federal court, sitting in habeas corpus, may rule a state prisoner was denied the effective assistance of counsel because it disagrees with the trial tactics or strategy of the defense counsel.

STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall

> have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his behalf and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On November 27, 1966, a cab driver named John Dougherty was killed in the City of St. Louis. In November of 1967, the respondent, Sanford Thomas, was convicted of that murder. The state introduced evidence to establish that respondent and a man named Frederick Brown were accomplices in the offense. Frederick Brown had pleaded guilty to the murder on October 17, 1967. The respondent duly appealed and the Missouri Supreme Court affirmed the conviction; *State* v. *Thomas,* 440 S.W.2d 467 (Mo. 1969). In 1970, the respondent collaterally attacked his conviction by filing a Motion to Vacate Sentence and Judgment, under Missouri Supreme Court Rule 27.26. The trial court granted respondent an evidentiary hearing, and subsequently denied his motion. On appeal, the Missouri Supreme Court found the trial court had not made proper findings of fact and conclusions of law as required by Rule 27.26, and remanded for a new evidentiary hearing. See *Thomas* v. *State,* 465 S.W.2d 513 (Mo. 1971). Respondent filed a second motion to vacate his conviction and a second evidentiary hearing was held. Again, the trial court denied relief and respondent appealed. On that appeal, the Missouri Supreme Court considered the evidence from the original trial, as well as from both 27.26 hearings, and denied relief; *Thomas* v. *State,* 512 S.W.2d 116 (Mo. 1974).

On July 22, 1974, respondent's motion for rehearing was denied.

On August 5, 1974, Thomas filed his petition for habeas corpus relief in the federal District Court for the Eastern District of Missouri. (The names of the parties will now be used to avoid confusion; the petitioner herein being the respondent in the habeas corpus proceeding, and the petitioner therein is now the respondent.) Three days later, the court ordered Wyrick to respond and show cause why a writ of habeas corpus should not be granted. Wyrick filed a Motion to Dismiss, or in the Alternative, for a More Definite Statement. Discussion between counsel clarified the issues and Wyrick filed his response on November 22, 1974. Counsel for both parties appeared before the court on January 24, 1975, and presented argument. Neither party requested an evidentiary hearing. On August 6 of that year, the District Court denied Thomas' request for habeas corpus relief.

Thomas appealed, the case was argued before the Eighth Circuit Court of Appeals on January 15, 1976, and on April 28, 1976, the court issued its opinion reversing and remanding the judgment of the District Court and directing that court to issue a writ of habeas corpus discharging Thomas if the state did not retry him within 90 days. Wyrick moved for an extension of time in which to file a petition for rehearing, and did file such petition within the time period granted by the Court of Appeals. On May 28, 1976, the court denied the Petition for Rehearing, or in the Alternative, Rehearing En Banc.

REASON FOR GRANTING CERTIORARI

The Eighth Circuit Court of Appeals Erred in Ordering That a Writ of Habeas Corpus Be Issued for the Reason That Respondent's Defense Counsel Was Not Effective; Because Such Order Was Made by Engaging in Pure Speculation Without Any Showing of Actual Prejudice, and by Second-Guessing the Trial Strategy of the Defense Attorney.

The petitioner requests this Court to grant a writ of certiorari and review the decision of the Court of Appeals for the Eighth Circuit for two reasons. First, the opinion conflicts with the standard recently developed by that court for evaluating whether a defendant was denied the effective assistance of counsel, by markedly changing the method for determining whether the defendant was prejudiced. Second, the opinion conflicts with case law from other circuits by second-guessing the tactics or trial strategy of the defense counsel.

The Court of Appeals reversed and remanded the judgment of the District Court and ordered it to issue a writ of habeas corpus discharging the respondent, finding he had been denied the effective assistance of counsel because his defense attorney had not interviewed any of the state's witnesses. In making such ruling, the Court of Appeals discussed the cases it had decided in recent years on the question of effective assistance of counsel, and while noting it is difficult to put the standard for measuring a counsel's performance into precise language seemed to still adhere to the "farce or mockery of justice" standard. What is most important is the Court of Appeals has made it clear that standard is not to be taken literally, but that all

factors are to be considered, and the person attacking the counsel's representation shoulders a heavy burden.

After briefly discussing four cases it had decided in the last two years on the question of adequacy of counsel, the Court of Appeals placed the most reliance on its decision in another case involving a state prisoner traveling the federal habeas corpus road, apparently because the defense counsel therein involved also followed the practice of not interviewing state witnesses. See *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974).

A reading of *McQueen* shows that relief is not granted simply upon a showing the defense counsel was derelict in one of his essential duties, thereby failing to render effective assistance of counsel. Once such constitutional deprivation is established, it still must be determined whether the defendant was prejudiced before relief is granted. The Court of Appeals addressed this as follows:

> "Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first, determining, as we have already done, whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client; and second, determining, as will be done on remand, whether the failure prejudiced his defense." Loc. cit. 498 F.2d 218.

The petitioner agrees the failure of a defense counsel to not interview the state's witnesses is not an acceptable general policy, and believes adherence to such policy strongly suggests that counsel's representation may not measure up to the constitutional requirements. What is more important is that petitioner agrees with the Court of Appeals' statement that in certain cases the defense

counsel's "professional judgment may lead him to decline to interview some or all of the government's witnesses," and contends the defense counsel's failure to interview Frederick Brown was clearly an easily defensible exercise of the defense counsel's professional judgment in this case. (Slip Opinion 13, n. 7.) For that reason, petitioner does not agree with the Court of Appeals' finding of ineffective assistance of counsel. However, the petitioner does not wish to further pursue the finding of ineffective assistance of counsel, and is not asking for certiorari on such ground, but instead, strongly contends the Court of Appeals erred in reversing the judgment of the District Court, said reversal made without a showing that respondent was actually prejudiced and by second-guessing the strategy of defense counsel.

Before discussing prejudice it is necessary to understand the facts. The respondent was convicted of murdering a cab driver named John Dougherty. Frederick Brown, a companion of the respondent, confessed to the murder, and implicated the respondent. Brown did not testify at the respondent's trial, nor did his confession go before the jury. What the state established was well described by the Missouri Supreme Court, and quoted by the Court of Appeals as follows:

> "On Sunday evening, November 27, 1966, defendant had been riding around the North Florissant and Cass Avenue neighborhood in St. Louis with a number of other youths. About 8:00 p.m., they went to the Greyhound Bus Station. At the station one Frederick Brown and defendant got into a taxicab, driven by John Dougherty, and the cab proceeded south on Broadway. One of the youths who had been with Brown and the defendant at the bus terminal came back to where the others were parked and reported

that Brown and defendant were going to 16th and Mullanphy. The others tried to follow the cab, but lost it in the traffic and then drove to Brown's house. Some time later, Dougherty was found in the front seat of his cab at 16th and Mullanphy unconscious. A tooth was knocked out and he was bleeding from two stab wounds in his chest, which wounds proved fatal.

"There was further testimony that Brown and defendant later went to Brown's house and entered the back door into the kitchen where the other boys were assembled, and that they threw a watch and wallet on the table and said, 'That was all they got, they robbed the cab driver.' The watch and wallet were later identified as having belonged to Dougherty. One of the youths told his father something about what had occurred and his father reported the matter to the police.

"Brown was arrested the next day and pointed out to officers a garbage can in which they found portions of the partially burned wallet and pieces of charred paper that had been in it. The knife used in the murder was given to Niles Pursley by Brown's girlfriend and was recovered by the police.

"Defendant, who apparently had no previous criminal record, was the only witness for the defense. He stated that after he and Brown entered the cab, Brown whispered, 'Let's rob the cab driver,' but that he refused to go along with that plan and got out of the cab at 14th and Cass. He further stated that he later got another cab and went to 18th and Cass to see if Brown was at his mother-in-law's house; that about that time he saw Brown walking up the street so they both got into another cab and went

to Brown's house, where they went inside. Defendant denied participating in the crime and denied that he and Brown walked into the kitchen and threw the watch and wallet on the table and said, 'That's all we got out of the robbery.'" Slip Opinion 2-3 and 512 S.W.2d 118.

The Court of Appeals ruled the defense counsel should have interviewed: (1) Frederick Brown, (2) the young men who were with Frederick Brown and the respondent before they got into the cab and who were at Brown's house when the two arrived after the incident, and (3) the people in Brown's mother-in-law's house, apparently Brown's wife and her cousin. The defense counsel's failure to interview Brown seems to be the most important element in the reasoning of the Court of Appeals, and it is the only bit of specific evidence that has been brought before the courts. Because the other two shortcomings of respondent's defense counsel are more easily covered, they will be discussed first.

Two of the youths who accompanied Brown and the respondent, Niles Pursley and Lonnie Anderson, testified for the state. The Missouri Supreme Court described their testimony as follows:

"Niles Pursley, one of the youths said Brown and defendant came to Brown's house on Chambers Street. The others were already there in the kitchen. Brown and defendant entered through the back door. As to what happened then, Pursley testified on direct examination:

"'Q. When they came in, I want you to tell Judge Mayfield and the jury what they did, when they came in.'

" 'A. They said, they threw a watch and wallet on the table, and said that was all they got, they robbed the cab driver.'

" 'Q. Did anybody else come in with them?'

" 'A. No, sir.'

"On cross-examination, the witness testified:

" 'Q. (continues) And they entered. Is that right, into the kitchen?'

" 'A. Yes.'

" 'Q. And did Brown stay in the kitchen?'

" 'A. Well, they stayed a few minutes, and made a statement, they got this knife and money, this watch and wallet.'

" 'Q. Brown told you he got the watch and wallet?'

" 'A. I'm not certain, which one said it, one of the (sic) said it.'

" 'Q. You don't know which one made the statement?'

" 'A. No, not for sure, one of them did.'

" 'Q. Then, what happened?'

" 'A. Then, they went, well, we sat there for awhile and I went in the latrine, a couple went into the living room, and one was going through the wallet.'

" 'Q. You don't know which one?'

" 'A. No, sir.'

"Lonnie Anderson, another of the youths, testified that he talked to Frederick Brown the next day. Brown was wearing the wrist watch. He told Anderson that he had robbed and killed the cab driver and laughed about it, said that he had stabbed him and showed Anderson the knife, which was a pocket knife produced by the state as Exhibit 1, but said nothing about defendant being with him. Anderson admitted he told the police that when Brown and defendant arrived at the house Sunday evening as they entered Brown said, 'We stuck up a cab driver,' and laughed and talked about it and that Brown also said, 'Yeah, I stabbed him.' " Loc. cit. 440 S.W.2d 468-469.

The Court of Appeals did not find any specific or actual prejudice from the defense counsel's failure to interview the youths who were with Thomas and Brown that night, but simply concluded that if defense counsel had known what Frederick Brown would later testify to, he would have been better able to cross-examine Anderson and Pursley, and in a position to "vigorously pursue" those witnesses. Frederick Brown's story changed when he recanted his confession on November 3, 1969, nearly two years after the respondent was convicted. The Court of Appeals summarized his subsequent testimony as follows:

> "Brown supplemented his affidavit by his testimony given at the Missouri post-conviction hearing, stating that Lonnie Anderson, who had followed the taxicab in an automobile, and Walter Williams, who entered the cab prior to the crime, participated with Brown in Dougherty's murder. He further stated that in his confession that he had implicated Thomas to cover up the participation of Williams and Anderson. He explained that he had decided to tell the truth be-

cause neither Anderson or Williams had done anything to help him (Brown) while incarcerated. He also testified that if he had been called as a witness at the Thomas trial he would have told the truth, *i.e.*, that Thomas was innocent." Slip Opinion 17-18.

To suggest defense counsel could have better represented the respondent by having such knowledge is to engage in pure speculation.

The Court of Appeals also believed that if defense counsel had such information, it would "have motivated inquiry" of the people present at the home of Brown's mother-in-law to determine whether the respondent had in fact arrived at that house looking for Brown, as he claimed. Again, the Court of Appeals does not show any specific or actual evidence that might have been favorable to the respondent but simply engages in speculation.

In considering whether the Court of Appeals properly relied on defense counsel's failure to interview the persons just discussed, it is important to keep two thoughts in mind. First, the Court of Appeals in *McQueen* held the habeas corpus petitioner had the burden of showing prejudice by stating as follows:

> "What we are saying is that, here, the petitioner must shoulder an initial burden of showing our *existence of admissible evidence* which could have been uncovered by reasonable investigation and *which would have proved helpful* to the defendant, either on cross-examination or in his case-in-chief at the original trial." 498 F.2d 220. (Emphasis added.)

The Court of Appeals also stated the habeas corpus petitioner "must be allowed" to show the circumstances had changed, making it impossible to produce helpful evidence. Second, respondent has had three chances to show such

existence of *helpful evidence,* having had two evidentiary hearings in post-conviction proceedings in Missouri, and being asked by the federal District Court whether he had any evidence to present. Because respondent has had three opportunities to approach Pursley and Anderson, or the persons at the house of Brown's mother-in-law, and has not done so, the petitioner contends the Court of Appeals' speculative exercises certainly failed to meet the existing standard for determining the question of whether respondent was prejudiced.

The last, and most important, question to be considered is whether the respondent was prejudiced because his defense counsel did not interview Frederick Brown. This appears to be defense counsel's shortcoming relied on most heavily by the Court of Appeals. On p. 21 of the Slip Opinion that court stated:

> "The petitioner has demonstrated that reasonable investigation by Thomas' attorney could have uncovered admissible evidence which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial . . . once it is shown that defense counsel breached an essential duty, the sufficiency of petitioner's proof of prejudice turns on whether admissible evidence has been uncovered which a jury could reasonably weigh in assessing guilt or innocence." Slip Opinion, p. 21.

Brown's recantation of his confession was the only piece of specific or actual evidence produced by the respondent or discussed by the Court of Appeals. Therefore, the petitioner, as well as the dissenting judge, believes the majority relied on that factor in issuing its opinion. What is most important is that such language makes it clear the Court of Appeals found the respondent was prejudiced by second-guessing the trial strategy of defense counsel.

Because respondent's attorney knew of Frederick Brown's confession and that such confession implicated the respondent, he decided not to use Frederick Brown as a witness. As stated above, Brown did not recant his confession for some two years, but the defense counsel's testimony at the post-conviction evidentiary hearings establishes that he thought of, and considered, such possibility. His testimony was summarized by the Missouri Supreme Court as follows:

> ". . . He then discussed the case at length with the defendant and developed a theory of defense that he should use defendant as a witness because he had a clean record and was emphatic in his position that he was innocent, and that he had reason to hope the defendant could convince a jury of his innocence; *that he learned of the confession that Frederick Brown had made which implicated the defendant and, for that reason, did not want to use Brown as a witness because the facts in the confession implicating defendant could be brought out in impeaching Brown's testimony in the event Brown repudiated the confession and stated that defendant did not participate in the crime; . . . that he did not interview Brown because he knew he did not want to use him in any event,* and did not recall defendant having requested that he interview witnesses at the house of Brown's mother-in-law where defendant had stated he had gone after he left the cab . . ." Loc. cit. 512 S.W.2d 119-120. (Emphasis added.)

The petitioner contends it is clear the defense counsel's failure to interview Frederick Brown was definitely an exercise of his professional judgment. Because the Court of Appeals seemingly relies on this, the petitioner contends that court has second-guessed the tactics or strategy of

respondent's defense counsel in preparing for, and trying, the case.

Such ruling clearly conflicts with rulings from several other circuits, as well as previous, but unrecognized, opinions from the same court. In *United States* v. *Grant,* 489 F.2d 27 (8th Cir. 1973), a case involving a direct appeal, the Court of Appeals denied the appellant's claim that his counsel was ineffective by stating:

> ". . . strategic choices as to the conduct of a trial, deliberately made and employed by counsel, cannot, if they go awry, serve as the basis for a later appeal." Loc. cit. 29.

In a case involving a question quite similar to this case, the Court of Appeals denied appellant's claim that his counsel was ineffective; *United States* v. *Johnson,* 466 F.2d 1206 (8th Cir. 1972), cert. denied 409 U.S. 1111, 93 S.Ct. 923, 34 L.Ed.2d 693. That defense counsel failed to interview two witnesses who had given incriminating statements, as did Frederick Brown, and the Court of Appeals held such failure did not constitute ineffective assistance of counsel because the defendant had admitted involvement, and because he would not have been able to suppress the statements. While the respondent has never admitted involvement there was a much stronger reason in this case for the defense counsel's decision not to use Brown even if he repudiated his confession. There was no direct evidence of the respondent's involvement, but there would be if Brown was a witness, either by that person's own testimony, or by his impeachment if he repudiated or recanted his prior statement. That would, of course, bring the confession before the jury.

For cases from other circuits holding those courts are not to second-guess the trial tactics or strategy of defense

counsel, see *Beasley* v. *United States*, 491 F.2d 687 (6th Cir. 1974), wherein the court stated:

> "Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, . . . If, however, action that appears erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective." Loc. cit. 696.

The petitioner contends the defense counsel's decision not to use Frederick Brown, even though he considered that person might recant his confession, was the decision all competent criminal attorneys would make. Also see *United States* v. *DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), wherein the court stated it did not ". . . sit to second-guess strategic and tactical choices made by trial counsel." It did allow that if such decisions were made because counsel was uninformed it could constitute ineffective assistance of counsel. Defense counsel did not know Brown would later change his story, but that does not mean he was uninformed. His decision was made considering the value of Brown's appearance even if he did repudiate his confession.

Finally, see *Mengarelli* v. *United States Marshal in and for District of Nevada*, 476 F.2d 617 (9th Cir. 1973); *United States ex rel. Johnson* v. *Vincent*, 370 F.Supp. 379 (S.D.N.Y. 1974), reversed on other grounds 507 F.2d 1309, cert. denied ..... U.S. ....., 95 S.Ct. 1435, ... L.Ed.2d .....; and *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311 (2d Cir. 1974), cert. denied 417 U.S. 972, 94 S.Ct. 3179, 41 L.Ed.2d 1144. The last case succinctly states petitioner's position:

> "It has long been clear that tactical errors or strategic miscalculation by counsel affords no constitutional grounds for relief." Loc. cit. 1312.

In summary, the petitioner contends this Court should grant certiorari and review the decision of the Court of Appeals, because its ruling and order conflicts not only with its own decisions, but with decisions by the Courts of Appeals in several other circuits.

CONCLUSION

For the above reasons, the petitioner requests this Court to issue a writ of certiorari and review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

NEIL MACFARLANE
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Petitioner

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 74 - 539 C (4)

SANFORD THOMAS,
Petitioner,

vs.

DONALD WYRICK, Warden,
Respondent.

ORDER

(Filed August 6, 1975)

In accordance with the opinion of the Court filed this day,

IT IS HEREBY ORDERED that the action be and is dismissed.

/s/ John F. Nangle
John F. Nangle
United States District Judge

Dated: August 6, 1975.

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 74 - 539 C (4)

SANFORD THOMAS,
Petitioner,

vs.

DONALD WYRICK, Warden,
Respondent.

OPINION

(Filed August 6, 1975)

This is a petition brought by Sanford Thomas for a writ of habeas corpus under 28 U.S.C. §2254. Respondent is the warden of the Missouri State Penitentiary where petitioner is presently serving a life sentence imposed by a jury in the Circuit Court of the City of St. Louis, Missouri. Petitioner's complaints herein arise out of the case for which he is presently incarcerated.

The grounds asserted by petitioner are the following:

1) that he was denied effective assistance of counsel (in the respects hereinafter set forth);

2) that he was denied due process of law because false statements were made by the prosecutor at defendant's original trial, such statements relating to the availability of an important witness; and

3) that petitioner's trial attorney had a conflict of interest in that he once represented the victim of the

crime and the victim's wife and failed to advise petitioner of this relationship, which conflict thereby rendered such attorney unable to properly represent petitioner's interests.[1]

A history of the state court proceedings is necessary in order to fully understand the case. The petitioner was convicted of first degree murder in 1967 in a jury trial and sentenced to life in prison. He appealed and the Missouri Supreme Court affirmed the conviction. *See State* v. *Thomas*, 440 S.W.2d 467 (Mo. 1969). In 1970, the petitioner filed a motion to vacate the judgment and sentence under Missouri Supreme Court Rule 27.26. A hearing on this Rule 27.26 motion was held before Judge Waldo Mayfield, who had presided at the initial trial. Judge Mayfield denied petitioner's motion and petitioner appealed. On this appeal the Missouri Supreme Court held that the trial court failed to make proper findings of fact and conclusions of law, as required by Rule 27.26, and remanded the case for a new evidentiary hearing. *See Thomas* v. *State*, 465 S.W.2d 513 (Mo. 1971).

A second evidentiary hearing was held, this time before a different judge, Judge P. F. Palumbo (Judge Mayfield having retired). After an evidentiary hearing the trial court denied relief and the petitioner appealed. In this appeal, the Missouri Supreme Court considered the evidence from the original trial and both Rule 27.26 hearings and denied relief to petitioner (Judge Seiler dissenting). *See Thomas* v. *State*, 512 S.W.2d 116 (Mo. 1974). Thereafter, petitioner brought this action.

By agreement of the parties the record in this case includes the transcripts of the original trial and of the

---

1. Thomas' petition did not include this third ground but the parties have agreed that such contention may be determined in this case.

two Rule 27.26 evidentiary hearings. The Court has examined these transcripts and all records of the Rule 27.26 proceedings and finds that an adequate, complete and fair evidentiary hearing was afforded Thomas by Judge Palumbo. No further hearing is required in this Court by *Townsend* v. *Sain*, 372 U.S. 209 (1936).

This Court finds, and respondent does not contest, that petitioner has exhausted his administrative remedies regarding the three above alleged grounds.

In the review of petitioner's appeal from his original conviction, Judge Seiler of the Missouri Supreme Court set out the facts which the jury could reasonably have found from the evidence. 440 S.W.2d *at* 468-469.

In its affirmance of the second circuit court Rule 27.26 decision denying petitioner's application, the Missouri Supreme Court also summarized the facts, 512 S.W.2d *at* 118 as follows:

> On Sunday evening, November 27, 1966, defendant had been riding around the North Florissant and Cass Avenue neighborhood in St. Louis with a number of other youths. About 8 p.m., they went to the Greyhound Bus Station. At the station one Frederick Brown and defendant got into a taxicab, driven by John Dougherty, and the cab proceeded south on Broadway. One of the youths who had been with Brown and defendant at the bus terminal came back to where the others were parked and reported that Brown and defendant were going to 16th and Mullanphy. The others tried to follow the cab but lost it in the traffic and then drove to Brown's house. Sometime later, Dougherty was found in the front seat of his cab at 16th and Mullanphy unconscious.

> A tooth was knocked out and he was bleeding from stab wounds in his chest, which wounds proved fatal.
>
> There was further testimony that Brown and defendant later went to Brown's house and entered the back door into the kitchen where the other boys were assembled, and that they threw a watch and wallet on the table and said "that was all they got, they robbed the cab driver". The watch and wallet were later identified as having belonged to Dougherty. One of the youths told his father something about what had occurred and his father reported the matter to the police.
>
> Brown was arrested the next day and pointed out to officers a garbage can in which they found portions of the partially burned wallet and pieces of charred paper that had been in it. The knife used in the murder was given to Niles Pursley by Brown's girl friend and was recovered by the police.
>
> Defendant, who apparently had no previous criminal record, was the only witness for the defense. He stated that after he and Brown entered the cab Brown whispered, "Let's rob the cab driver," but that he refused to go along with that plan and got out of the cab at 14th and Cass. He further stated that he later got another cab and went to 18th and Cass to see if Brown was at his mother-in-law's house; that about that time he saw Brown walking up the street so they both got into another cab and went to Brown's house, where they went inside. Defendant denied participating in the crime and denied that he and Brown walked into the kitchen and threw the watch and wallet on the table and said, "That's all we got out of the robbery.".

The principle is clear that if there is sufficient evidence to sustain Judge Palumbo's findings, this Court must deny petitioner any relief.

> The district court must treat a state court finding of fact on a disputed issue as presumptively correct where a "full and fair hearing" has already been held and where the state court's finding of fact is "fairly supported by the evidence".

Townsend v. *Sain*, 372 U.S. 293, 835 S.Ct. 745, 9 L.Ed.2d 770; 28 U.S.C. §2254(d).

As Judge Webster stated in *Winford* v. *Swenson*, ... F.2d ..... (8th Cir. No. 74-1165, slip op. p. 8, filed June 4, 1975);

> These findings are entitled to a presumption of correctness with the burden on the habeas corpus petitioner to establish that such factual determinations were erroneus. 28 U.S.C. §2254(d); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 695 (1973).

In order to determine whether petitioner has sustained his burden, this Court will consider in order petitioner's three contentions.

1. *Was petitioner denied effective assistance of counsel?*

Wolfs v. *Britton*, 509 F.2d 304 (8th Cir. 1975) and *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974) both hold that lack of pre-trial investigation can constitute ineffective assistance of counsel.

The precise standard to be used in order to ascertain whether the questioned legal representation "passes muster" in the Eighth Circuit is a bit unclear. In *Car-*

darella v. *United States*, 375 F.2d 222 (8th Cir. 1967), *cert. den.*, 389 U.S. 882 (1967), the Court ruled that

> a charge of inadequate representation can prevail "only if it can be said that what was or was not done by defendant's attorney for his client made the proceedings a farce or mockery of justice, shocking to the conscience of the Court". [citations omitted].

375 F.2d *at* 230.

This test was affirmed in *Crenshaw* v. *Wolff*, 504 F.2d 377 (8th Cir. 1974), but Senior Circuit Judge Matthes recognized a possible change in such standard when, *at* page 380, he stated:

> The standard traditionally employed by this court to determine if counsel rendered ineffective assistance has been whether a "farce" or "mockery of justice" had occurred. More recently several jurisdictions have worded the test for determining whether assistance of an attorney was constitutionally adequate in terms of whether the accused received "reasonably competent assistance of counsel". See generally McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974). Although this court in McQueen declined to rule whether the "mockery of justice" standard should be abandoned in favor of the standard more recently established in other jurisdictions, we find that the conduct of the assistant public defender in this case was fully adequate under either test.

Circuit Judge Ross, in *DeBerry* v. *Wolff*, 315 F.2d 1336, *at* 1340 (8th Cir. 1975), indicated that the "mockery of justice" standard was still being followed in the Eighth Circuit.

In the case of *Johnson* v. *United States of America*, 506 F.2d 640 (8th Cir. 1974), Chief Judge Gibson stated as follows:

> While our prior cases such as McQueen v. Swenson, supra; Garton v. Swenson, supra, and Robinson v. United States, supra, speak of denial of effective assistance of counsel or ineffective representation, and similar phrases, it appears to us that characterizing counsel's conduct on the basis of effectiveness may suggest a standard not supported by constitutional principles. The term "effective", in its most general application, describes something which ultimately achieves a desired result. With reference to professional representation in criminal cases, that might be interpreted to mean achieving only outright acquittal of the defendant on the charges without regard to the weight and strength of the evidence adduced. A more appropriate nomenclature for the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar. The standard would refer more precisely to the professional competence of one who has completed a long and arduous course of study for a professional license, and who has acquired some experience in applying legal principles and conducting court trials.
>
> The professional standard could be said to include the responsibility to insure that the client is tried according to the applicable rules of evidence and practice and to urge such arguments on a client's behalf as are indicated by the evidence, or lack of evidence, adduced. It is not, however, constitutionally limited to an "effective" type of representation that would achieve acquittal of a defendant on any charge regardless of the facts. The constitutional provision includes

> neither "effective" nor "adequate" nor other adjectival terms in its guarantee of assistance of counsel. It merely states in plain language that "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense". U.S. Const. Amend. VI. [footnotes omitted].

506 F.2d *at* 646.

At his trial petitioner was represented by Alfred I. Harris (now deceased), an attorney retained by petitioner's mother. Petitioner's bases for claiming ineffective counsel are that:

a) Harris failed to adequately prepare for trial in that he only conferred with petitioner once while petitioner was being held pending trial, once while petitioner was undergoing a psychiatric examination and once just before the actual trial began. Further, petitioner's mother said she tried many times to speak with Harris but was unable to do so.

Harris' recollection was that he conferred with petitioner several times and was in frequent contact with his family. Further, petitioner has failed to show how additional conferences would have helped his defense. Petitioner and his mother had told Harris all they knew. It is likely that more frequent meetings may have benefited petitioner's morale but that is hardly a factor to consider in this action. Judge Palumbo found that Harris had sufficient contact with petitioner and his family to prepare for trial and concluded that "ineffectiveness of counsel is not established merely by the absence of frequent conferences with the petitioner". It is the finding of this Court that such finding and conclusion are supported by the evidence presented at the Rule 27.26 hearing.

b) Harris admittedly failed to interview possible witnesses in preparation for his case.[2]

Petitioner testified he gave Harris the names of several possible witnesses in his behalf, *i.e.* the people at the house of the grandmother of one Frederick Brown (also involved in the crime). None of these persons testified at either Rule 27.26 hearing. Petitioner indicated that they might be helpful in supporting a defense of alibi.

Petitioner has not made clear whether he identified for Harris (or tried to) the other youths with him the fateful evening of November 27, 1966. Two of them testified as state's witnesses at the trial (Pursley and Anderson). However, the state listed sixteen persons as prospective witnesses at the initial trial and Harris concededly had knowledge of other witnesses who were expected to testify for the state. Harris admitted that he did not interview any of these witnesses. Concerning the state's witnesses, Harris indicated he wanted to avoid any charge of tampering. A review of his cross-examination of key state witnesses shows that Harris made a point of establishing that he had never before spoken with the witnesses.

In some respects these facts relating to pre-trial interviews of witnesses are similar to those in *McQueen, supra.* Concededly in neither case did counsel interview any witness. In the case at hand, although there was only one admitted eye witness (Brown, whose statement fully implicated petitioner), this witness was not contacted in any fashion.

---

2. These witnesses fall into three groups: 1) those at Brown's grandmother's when Thomas stopped by, 2) the other young men with Brown and Thomas the evening in question, and 3) Frederick Brown.

The Court of Appeals said in *McQueen, at* 216, that "the exercise of a defense attorney's professional judgment should not be second-guessed by hindsight", but the Court went on to point out that failure to interview prosecution witnesses under the circumstances of the case before it constituted an abdication of the attorneys' professional judgment.

This Court believes the applicable rule defining the parameters of the Sixth Amendment right to assistance of counsel is in this Circuit the "farce" or "mockery of justice" rule announced in *Cardarella.* The Court concludes that all of petitioner's contentions, singularly or jointly, do not constitute inadequate representation under this criterion. This is, undeniably, a close case. If the applicable rule were the one adverted to by Judge Matthes in *Crenshaw, supra, i.e.* "reasonably competent assistance of counsel", I believe petitioner would not have been afforded his constitutional right to assistance of counsel.

Regardless of the standard by which Thomas' counsel should be measured, I do not believe that any failing of his counsel prejudiced him. *See McQueen,* supra.

The importance of Brown's relatives as "alibi" witnesses is not clearly established. In his trial, petitioner testified he got out of the cab, leaving Brown alone with the driver. He walked a bit and caught another cab and went to Brown's mother-in-law's house where she, Brown's wife and Brown's wife's cousin were present (TR. 218). Thomas said he stayed there "just long enough to ask . . . had he been there" ("he" meaning Brown) (TR. 218). Thomas called a cab from there and it was outside blowing its horn as he left the house. As petitioner came out, Brown was walking up the street and they both got into the cab and went to Brown's house (TR. 220). It is conceivable that these three persons might have sup-

ported petitioner's claim of "alibi". They perhaps were the persons petitioner referred to when he said he tried to give names to Harris in his first conference (TR. 118).

Judge Palumbo found that their testimony would have been of questionable value. The petitioner's own testimony at his trial indicates that he was not in their presence very long. Further, petitioner did not offer them as witnesses in either Rule 27.26 proceeding nor has he made any effort to indicate that their testimony would have supported his "alibi". The petitioner's actions after he said he left Dougherty's cab, the vagueness concerning the exact time, the lack of any evidence that Brown's relatives saw Brown come up as petitioner left their presence, all support Judge Palumbo's conclusion that the testimony of these witnesses would have been of questionable value. In view of Brown's change of heart and his testimony, it would seem fair to assume that petitioner would have produced Brown's relatives at his Rule 27.26 hearings *if* they would have been helpful to his cause.

This Court finds, concerning the witnesses at the house of Brown's mother-in-law, that petitioner has failed in his burden to show that their testimony would have proved helpful to the defense.

Concerning the number of companions who were with petitioner during the time he entered the cab with Brown and when he arrived at Brown's house later, it seems to be an exercise of hindsight to now state that failure to interview them prejudiced petitioner's case. Nothing is claimed to have occurred before petitioner entered the cab with Brown which would be exculpatory or helpful to petitioner. In other words, there was no factual disagreement of any events up to the time petitioner entered the cab with Brown.

Between the time petitioner and Brown entered the cab and the time they met again later outside of Brown's house, according to petitioner, none of these "companions" was with petitioner. The petitioner's version of what happened at Brown's house has only two variances from the prosecution's version: 1) Lonnie Anderson testified that he had told a police officer that Brown said when he entered the apartment "we stuck up a cab driver", then laughed and said "yeah, I stabbed him"; and 2) Niles Pursley testified that when Brown and petitioner came in "they threw a watch and wallet on the table and said . . . they robbed the cab driver". On cross-examination Pursley stated he did not know which of them made this statement.

At his trial, petitioner denied that these statements were made in his presence and testified that he and Brown were going up the stairs to Brown's house when the others came up (TR. 220).

It appears that petitioner, Brown, and four others (Jessie Stewart, "Boonie" or "Buds", Dennis Wright, and Johnny Wright), were present at Brown's house at this time. Stewart, "Boonie" or either of the Wrights conceivably could have supported petitioner's defense, although they may have been difficult to locate. At his trial, petitioner denied knowing where any of these four young men were. Thus, at least at the time of trial petitioner would have been unable to locate any of them. There was no evidence at either Rule 27.26 hearing, and none has been suggested in this proceeding, to indicate that even if found these young men would have supported petitioner's case. Two of their friends testified against petitioner in his trial. This Court finds that petitioner has failed to show that the failure to interview these young men (*assuming* that his attorney would have been

able to locate them) prejudiced him in obtaining a fair trial.

Another possible witness must be discussed at this point, Frederick Brown. By the time petitioner came to trial Brown had confessed to robbing and stabbing the cab driver and had fully implicated petitioner in this crime. Brown had pled guilty and was serving two life sentences in the Missouri State Penitentiary in Jefferson City, Missouri. Harris had made no effort to interview Brown before the trial, by deposition or otherwise. After petitioner had been sentenced to the State Penitentiary and had been there for some months. Brown prepared an affidavit stating that petitioner had *not* been involved in the crime but that two others were. This affidavit was prepared about one year after petition's trial. Brown also testified to this effect at the Rule 27.26 hearings.

Harris conferred a number of times with the prosecutor's office. Judge Palumbo found that Harris had seen the state's files and knew what its witnesses could say and questioned whether additional interviews would have been helpful. He found that the witnesses whose names petitioner gave to Harris would have been of no value to petitioner's defense. Judge Palumbo further found that Harris was an experienced criminal trial attorney and that he competently tried petitioner's case.

Judge Palumbo found that Brown's testimony in the hearings completely lacked credibility. The record clearly shows that Brown himself testified that he fully intended to keep petitioner involved as a participant in the crime until certain of his plans fell through. Then he had a change of heart and, on November 3, 1969, prepared an affidavit completely changing his story and stating that petitioner had nothing to do with the robbery and killing.

Brown's "change of heart" occurred after certain events took place and this Court agrees with the finding of Judge Palumbo that Brown was not a credible witness and that, even if Harris had interviewed Brown before petitioner's trial, Brown would not have been any help in the defense of petitioner. There is more than ample evidence in the record to support Judge Palumbo's finding that the failure to interview and call Brown was based upon a choice of trial tactics. This Court so finds.

This is not mere speculation as a careful reading of Brown's testimony at the Rule 27.26 hearings will show. Brown clearly did not exonerate petitioner until his own hopes for help from the others he belatedly involved had completely caved in. This change of heart occurred months after petitioner's trial. Although Brown indicated at the Rule 27.26 hearings that he would have testified on behalf of petitioner if he had been called at petitioner's trial, this belated effort is so contradicted by Brown's other testimony, his confession, and his actions as to be totally unbelievable and this Court so finds.

Under all the evidence, this Court finds that petitioner has failed to sustain his burden under *McQueen* of showing that there existed admissible evidence from witnesses "which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant . . . at the original trial".

c) *Harris failed to advise petitioner of his constitutional right to remain silent and not testify.*

Judge Palumbo found that Harris did advise petitioner of his right to remain silent. The testimony of Harris clearly supports this finding. Harris recommended that petitioner testify since he appeared articulate, intelligent and had no prior record. This Court fully agrees with

Judge Palumbo's finding (and with Harris' advice). Under the circumstances of the case, it is hard to conceive of the petitioner not testifying in his own behalf and petitioner's complaint on this point is totally misplaced.

2. *Was petitioner denied due process because of the prosecution's erroneous statement that Frederick Brown was unavailable as a witness?*

Apparently due to a mistake in names (or for some other reason), the attorney prosecuting the case against defendant erroneously advised defendant's attorney that Frederick Brown, who was then in the penitentiary, had hepatitis and could not appear in court. Actually, Brown had been endorsed as a state witness but the prosecutor was allowed to withdraw this over Harris' objection.[3] A long discussion took place at the trial between the Court and the attorneys. During the discussion Harris indicated that he wanted the state to call Brown because Brown's testimony might help the defendant. However, he refused to attempt to have Brown brought in and made no reference to the hepatitis issue as being a consideration. It is clear to anyone familiar with trial tactics that Harris' comments regarding Brown's testimony were purely tactical and made in behalf of the defendant. As he testified in both Rule 27.26 hearings, being aware that Brown's confession fully implicated petitioner in the crime, Harris would not have called Brown even if he had been available. Thus, the prosecutor's false statement regarding Brown's availability of itself had no effect on Brown being

3. It is interesting to note that during Harris' direct examination of petitioner, the prosecution objected to petitioner's giving his reason for getting out of the cab (that Brown whispered to him "let's rob the cab driver") on the grounds that Brown was not available to refute the statement and this objection was sustained (TR. 215-217). However, by Harris' persistence, the point was clearly made before the jury.

called by petitioner or on petitioner's defense, unless we speculate that Harris, by conferring with Brown prior to trial or by pre-trial deposition, could have secured information or prospective testimony favorable to petitioner. Hence, the question here really falls into the previously treated question of pre-trial interview of witnesses (including Brown) covered earlier in this opinion. We have previously found that a pre-trial interview with Brown would have been fruitless under Brown's own testimony.

This Court holds that Judge Palumbo's finding that petitioner was not prejudiced by the prosecutor's erroneous statement is supported by the evidence. This Court further finds that the petitioner was not thereby deprived of due process of law.

3. *Did the relationship between petitioner's attorney and the victim (and his wife) violate any constitutional or other rights of petitioner?*

Mr. Harris had once represented the wife of Dougherty, the cab driver, who was robbed and killed in the crime for which petitioner was found guilty by a jury. Petitioner claims this constituted a conflict of interest which adversely affected Harris' representation of petitioner. Harris thought he had advised petitioner and his family of this acquaintanceship with the Dougherty family. In any event, Mrs. Dougherty was a minor witness, not at all important to any major issue. There is no evidence to indicate that Harris omitted any questions of her which an attorney would have asked had he not known her. Nor is there any evidence that Harris was in any way affected by his acquaintanceship with the Doughertys. Petitioner's case was in no way affected by Harris' relationship with the Doughertys. Judge Palumbo found no conflict or adverse effect on petitioner's case

because of this relationship and this Court so finds. *Cf.*, *United States* v. *Valenzuela*, ... F.2d ..... (8th Cir. slip op. No. 74-1668, p. 4, filed July 24, 1975).

For the foregoing reasons, this Court holds that petitioner was not denied a fair trial. In his claim of ineffective counsel, petitioner has failed to show resultant prejudice. The false information regarding Brown's unavailability did not constitute a failure to provide petitioner with due process. Lastly, the relationship between petitioner's attorney and the Doughertys was of no significance in any respect and had no bearing on petitioner's trial.

For these reasons the petition will be denied.

/s/ John F. Nangle
John F. Nangle
United States District Judge

Dated: August 6, 1975.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1699

Sanford Thomas,
Appellant,

vs.

Donald Wyrick,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 15, 1976.
Filed: April 28, 1976.

Before CLARK, Associate Justice, Retired;* BRIGHT and HENLEY, Circuit Judges.

BRIGHT, Circuit Judge.

Sanford Thomas seeks habeas corpus relief from his conviction in the state courts of Missouri of first degree murder and from his sentence of life imprisonment. The district court, after an evidentiary hearing, denied Thomas any relief. Thomas appeals, asserting that the assistance

---

*ASSOCIATE JUSTICE TOM C. CLARK, Retired, United States Supreme Court, sitting by designation.

afforded by his retained trial counsel fell below minimal constitutional standards and that the prosecutor violated due process by falsely stating that a crucial witness was unavailable due to illness. Thomas has fully exhausted his state remedies.[1]

The basic facts underlying petitioner's conviction are relatively uncomplicated. The Missouri Supreme Court accurately summarized them as follows:

> On Sunday evening, November 27, 1966, defendant had been riding around the North Florissant and Cass Avenue neighborhood in St. Louis with a number of other youths. About 8 p.m., they went to the Greyhound Bus Station. At the station one Frederick Brown and defendant got into a taxicab, driven by John Dougherty, and the cab proceeded south on Broadway. One of the youths who had been with Brown and defendant at the bus terminal came back to where the others were parked and reported that Brown and defendant were going to 16th and Mullanphy. The others tried to follow the cab but lost it in the traffic and then drove to Brown's house. Sometime later, Dougherty was found in the front seat of his cab at 16th and Mullanphy unconscious. A tooth was knocked out and he was bleeding from two stab wounds in his chest, which wounds proved fatal.

1. The Missouri Supreme Court affirmed Thomas' conviction on direct appeal. *Missouri* v. *Thomas*, 440 S.W.2d 467 (Mo. 1969). Two years later, that court considered Thomas' application for post-conviction relief. *Thomas* v. *Missouri*, 465 S.W.2d 513 (Mo. 1971). At that time the Missouri Supreme Court remanded for a new evidentiary hearing and directed the lower court to make specific findings of fact and conclusions of law on all issues presented. After that hearing, the Supreme Court, sitting *en banc*, denied Thomas relief. *Thomas* v. *Missouri*, 512 S.W.2d 116 (Mo. 1974) (*en banc*). Four justices concurred in the opinion, two concurred in the result, and one justice dissented.

There was further testimony that Brown and defendant later went to Brown's house and entered the back door into the kitchen where the other boys were assembled, and that they threw a watch and wallet on the table and said "that was all they got, they robbed the cab driver."[2] The watch and wallet were later identified as having belonged to Dougherty. One of the youths told his father something about what had occurred and his father reported the matter to the police.

Brown was arrested the next day and pointed out to officers a garbage can in which they found portions of the partially burned wallet and pieces of charred paper that had been in it. The knife used in the murder was given to Niles Pursley by Brown's girl friend and was recovered by the police.

Defendant, who apparently had no previous criminal record, was the only witness for the defense. He stated that after he and Brown entered the cab Brown whispered, "Let's rob the cab driver," but that he refused to go along with that plan and got out of the cab at 14th and Cass. He further stated that he later got another cab and went to 18th and Cass to see if Brown was at his mother-in-law's house; that about that time he saw Brown walking up the street so they both got into another cab and went to Brown's house, where they went inside. Defendant denied participating in the crime and denied that he and Brown walked into the kitchen and threw the

2. Although it was not made clear, this statement was evidently made by Brown, not Thomas. It was admitted against petitioner on the theory that his failure to deny the statement was an implicit admission of guilt. We note that there was no attempt at trial to show that the circumstances of the statement were such as to clearly implicate petitioner and to call for a denial if untrue.

watch and wallet on the table and said, "That's all we got out of the robbery." [512 S.W.2d at 118.]

We may also note that Thomas was age 17 at the time of the crime and age 18 at the time of the trial.

Appellant's claim to habeas corpus relief centers primarily upon the admitted failure of his retained trial counsel, Alfred I. Harris (now deceased), to interview any witnesses who might have lent support to petitioner's testimony that he was not present at the time when John Dougherty was killed. The state court found that defense counsel Harris did not interview any witnesses but confined his investigation to discussing the evidence with the prosecutor, learning of the confession of Frederick Brown, Jr. which implicated the petitioner,[3] and reviewing the contents of the state's file, which included statements of the witnesses endorsed by the state on the indictment. *See* note 6 *infra*, for an explanation of the practice of endorsement.

Petitioner asserts that there were at least three groups of witnesses which his attorney should have interviewed. First and foremost, petitioner asserts that his counsel should have interviewed Frederick Brown, who had admitted participating in the killing. Brown was clearly available to defense counsel had he wished to conduct an interview. Harris was retained as petitioner's attorney shortly after petitioner was first arrested in February of 1967. Petitioner was confined in the St. Louis city jail from that time until his trial on November 13, 1967. Brown was confined in the same jail. He pleaded guilty to murdering Dougherty on October 17, 1967, and remained in the St. Louis city jail until November 9, 1967, four days before the commencement of petitioner's trial.

---

3. This confession is referred to in the testimony at the post-conviction hearings but was not introduced into evidence.

The second group of potential witnesses were those other young men who were with Thomas and Brown before and after the killing. Harris evidently made no attempt to interview any of these individuals. Several of these were endorsed on the indictment as potential state witnesses and two, Lonnie Anderson and Niles Pursley, testified for the state at trial.

Thirdly, Harris made no attempt to interview any of the individuals which petitioner asserted he had met at the house of Brown's mother-in-law during his search for Brown after he claimed he had gotten out of the cab. These individuals were Brown's wife, and her cousin. The state court found that had Harris contacted these individuals they would have testified "that Sanford Thomas arrived at their house at some time during the evening and then left." The factual basis for this finding is not clear as these persons did not testify at any post-conviction hearing. Evidently the state court either credited petitioner's testimony or assumed these witnesses would support Brown's statement in some degree. Petitioner testified at the post-conviction hearings that not only would these individuals have confirmed that he came to their house, but also would have testified that he came there alone and that he was looking for Brown.[4]

---

4. Additionally, if Brown's statement is credited that he stopped at the house of Brown's mother-in-law, an investigator should ordinarily have sought further verification of Brown's statement through the taxi driver who was called by Thomas, as well as the taxi driver who delivered Thomas alone to the home of Brown's mother-in-law. As has already been noted, petitioner testified at trial that after getting out of the cab occupied by Brown and Dougherty at the corner of 14th and Cass, he walked south on 14th Street hoping to see his friends following in another car. When they did not appear, petitioner testified that he caught a second cab and went to the home of Brown's mother-in-law looking for Brown. While there, he testified that he called a "Victor cab." He testified that when he left the house, this cab was in the street honking for him; as he went toward

(Continued on following page)

It is not clear why defense counsel made no attempt to contact the persons present at the house of Brown's mother-in-law. They were not endorsed on the indictment as witnesses for the state. Evidently counsel was content to rely on Thomas' testimony alone to establish the facts to which these witnesses could testify.

However, matters are clearer with respect to defense counsel's failure to interview Brown and the other young men who were present before and after the alleged crime. These individuals had been endorsed by the prosecutor upon the indictment as state witnesses. *See* note 6 *infra.* Defense counsel testified at the post-conviction hearings that in order to avoid the appearance of impropriety he followed an established custom of not interviewing any government witnesses.

Although Brown was endorsed as a state witness, he did not testify at trial. When the trial commenced, the prosecutor informed the court that Brown would not be called. Defense counsel objected, stating that he anticipated eliciting favorable testimony from Brown on cross-examination.[5] The prosecutor then explained to the court that Brown was suffering from hepatitis and was quarantined. After being so informed, the trial court declined to order the prosecution to call Brown as a witness, but

---

Footnote continued—

the cab he met up with Brown. They then traveled together to Brown's home in the Victor cab. As we have noted, Thomas' attorney took no steps to verify his client's claim of innocence. Because no issue was made below of attorney Harris' failure to attempt to locate these drivers, we do not rely upon this omission as demonstrating incompetence of counsel. Our comments nevertheless illustrate the obvious—failure of any investigation precluded any possibility of obtaining evidentiary support for Thomas' claim of innocence.

5. Defense counsel has testified that this statement was simply bluster and that in fact he was relieved that Brown would not be called.

offered to provide assistance to the defense should it wish to call Brown. This offer was never accepted.

It now has been stipulated that the prosecutor was in error when he stated that Brown was quarantined at the time of trial. The basis for this mistake is not clear. There is some indication that a prisoner with a very similar name was in isolation at that time.

All of these events became revealed in dramatic highlight two years after petitioner's conviction when Brown recanted his statements implicating petitioner in the murder. He announced that he had implicated petitioner in order to protect two other individuals who were his close friends. He further stated that had he been interviewed by defense counsel, he would have told the truth at that time. Petitioner asserts that this clearly demonstrates that his counsel's failure to conduct an adequate investigation deprived him of effective assistance of counsel. Petitioner also asserts that in light of Brown's present testimony, the prosecutor's misrepresentation that Brown was unavailable at the time of the trial amounted to a denial of due process and requires reversal.

I. *Standard of Review.*

The district court expressed some uncertainty as to the proper constitutional standard by which petitioner's claim of ineffective assistance of counsel should be assessed. After reviewing our decisions the district court concluded that this circuit still adheres to the "farce or mockery of justice" standard. Applying this standard the district court denied petitioner any relief. However, the district court made the following observations:

> This is, undeniably, a close case. If the applicable rule were * * * "reasonably competent assistance

of counsel", I believe petitioner would not have been afforded his constitutional right to assistance of counsel.

Because there has been some variance in the language of our opinions and because the proper standard is important in determining this close case, we think it advisable for us to review the applicable law of this circuit.

We first considered an allegation of inadequate investigation and preparation by counsel in *Cardarella* v. *United States*, 375 F.2d 222 (8th Cir. 1967). There we said that

> a charge of inadequate representation can prevail "only if it can be said that what was or what was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court." [*Id.* at 230 (numerous citations omitted)].

As the cases cited in support of that statement demonstrate, the "farce and mockery" standard was universally accepted at that time.

However, having enunciated this apparently harsh standard, the *Cardarella* court then undertook a careful analysis of appellant's claim. The court first noted that the general competence of Cardarella's counsel was unquestioned. The opinion of the district court was quoted as follows:

> His chief counsel has long been recognized as one of the most outstanding criminal lawyers at the Kansas City Bar, both Federal and State, and has enjoyed unusual success in the trial of criminal cases.
>
> His associate counsel was a former member of the Federal Bureau of Investigation, and former assistant to the Attorney General of the United States, and long engaged in the practice of law at the Kansas City Bar. [*Id.* at 229.]

Although convinced of defense counsel's general competence and effectiveness, the court then examined the three specific grounds which appellant claimed demonstrated inadequacy. Two of the grounds concerned counsel's choice of issues to urge on appeal. These were found to lack substantial merit. The third ground was counsel's failure to discover two police reports. The court carefully examined the reports, analyzed their availability to counsel and concluded that counsel's failure to discover one of the reports demonstrated a " 'lack of diligence' in a legal sense." *Id.* at 232.

The court therefore undertook to review the entire record to determine whether this error by counsel was so prejudicial as to warrant reversal. The court concluded that there had been no "failure to present the case in any fundamental respect" and that

> [t]he one instance in which there was a "lack of diligence," in a legal sense, in "discovering" evidence does not suffice to overcome the overwhelming proof of record demonstrating the adequacy and ability of counsel, particularly where the evidence in question, even if availed of, could not have produced a different result. Our examination of both the trial and appellate record satisfies us that counsel for all defendants thoroughly prepared and tried the case with great resourcefulness, competently presented the available defenses, and disclosed all weaknesses and inconsistencies in the government's case. [*Id.* at 232.]

Our subsequent cases have followed the approach of *Cardarella* in assessing claims that an attorney's inadequate

investigation or preparation denied a defendant's right to assistance of counsel. In *Garton* v. *Swenson,* 497 F.2d 1137 (8th Cir. 1974), the district court had denied a habeas petition without an evidentiary hearing, ruling that the "farce and mockery" standard precluded relief. We reversed and remanded for a full hearing. Judge Stephenson's opinion emphasized that

> [w]e have based our decisions concerning effectiveness of counsel upon the particulars of each case. The standard for effectiveness is not easily reduced to precise words capable of rigid application. [*Id.* at 1140.]

In *Wolfs* v. *Britton,* 509 F.2d 304 (8th Cir. 1975), the tardy appointment of trial counsel had compelled him to try the case by the "seat of his pants." Petitioner urged that he had been denied his right to effective assistance of counsel even though his attorney's general ability and trial performance were unquestioned. We noted our obligation to proceed on an "ad hoc" basis giving due consideration to all factors bearing on counsel's performance and any resulting prejudice, including the strength of the government's case. *Id.* at 310. We decided that under the "combination of circumstances" counsel's lack of time to adequately prepare and investigate denied petitioner his right to effective assistance of counsel.

Our case most similar to the present one is *McQueen* v. *Swenson,* 498 F.2d 207 (8th Cir. 1974). *McQueen* reaffirmed the traditional "farce or mockery" standard. However, it included the following explanation:

> Stringent as the "mockery of justice" standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in

> this circuit. It was not intended that the "mockery of justice" standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness. [*Id.* at 214.]

See Garza v. *Wolff,* ..... F.2d ....., No. 75-1240 (8th Cir., Dec. 23, 1975) (Ross, J., dissenting).

III. *Burden of Proof.*

As we said in *McQueen,* the failure of defense counsel to provide adequate assistance is a unique form of constitutional error. It creates a "flaw in the adversary process", *id.* at 218-19, not attributable to the fault of either the government or defendant, and it undermines the integrity of the trial process in which all parties have a vital interest. However, despite the importance of assuring that a defendant is not denied adequate assistance of counsel, we emphasized that "there is and should be a presumption that counsel is competent," *id.* at 216, and we reiterated the "sound precept" that "the exercise of a defense attorney's professional judgment should not be second guessed by hindsight." *Id.* Because of these considerations we recognized that one challenging an attorney's exercise of professional judgment must "shoulder a heavy burden." *Id.* at 214.

However, these general considerations were found to be largely undercut by the defense counsel's custom of not interviewing government witnesses. There defense counsel testified that

> I never like to go out and interview State's witnesses. That is the duty of a detective or somebody to go to the Court and make an application. It is too subject to bribery offers. It puts you in a bad light.

> You can be accused of many things. I don't care to get into that. [498 F.2d at 212.]

Trial counsel in this case has testified he followed an identical custom. In *McQueen*, we found that this "absurd and dangerous policy" contravened the attorney's essential duty to make an adequate factual investigation and could only be viewed "as an abdication—not an exercise—of his professional judgment." *Id.* at 216.

Such a wholesale abdication of responsibility is significant in two respects. First, the failure of an attorney to exercise his professional judgment on behalf of his client is itself a serious breach of the lawyer's duty.[6] Second, and more important, for counsel habitually to disregard available information tends to erode the presumption of regularity and competence which normally attaches to an attorney's decision.[7]

6. Canon 5 of the ABA Code of Professional Responsibility provides that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Canon 6 provides that "A Lawyer Shall Represent a Client Competently." D.R. 6-101 (A)(2) forbids a lawyer to "[h]andle a legal matter without preparation adequate under the circumstances." Rule 4 of the Missouri Supreme Court Rules adopts these principles.

The Missouri Supreme Court Rules also provide that certain information is always available to the accused. Supreme Court Rule 24.17 requires that

> [w]hen an indictment * * * is filed the names of all material witnesses for the prosecution shall be endorsed thereon.

Rule 25.32 requires that upon request the state must disclose

> [t]he names and last known addresses of persons whom the state intends to call as witnesses * * *.

Obviously these rules are intended to assist the defense in adequately preparing for trial.

Chief Judge Gibson has suggested that the right to effective assistance of counsel should be assessed in light of the standards "prevailing among those licensed to practice before the bar." *Johnson* v. *United States*, 506 F.2d 640, 646 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 1404 (1975). We cannot believe it is the prevalent practice for Missouri defense counsel to invariably ignore sources of information about a crime made available to the defense by court rule.

However, in *McQueen*, we made clear that:

> Our inquiry as to whether or not to grant relief is not concluded by finding a constitutional violation in the failure of petitioner's attorney to make an adequate investigation of the case. Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process; first, determining * * * whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client; and second, determining * * * whether that failure prejudiced his defense. [498 F.2d at 218.]

Clearly, a defendant must bear the initial burden of demonstrating that counsel failed to perform some essential duty. However, once this failure has been established, it is not so clear which party bears the burden of establishing that counsel's error so significantly undercut the reliability of the trial process as to require reversal. As we recognized in *McQueen*, the circuits disagree on this point. *Id.* at 219. After reviewing the leading cases on both sides of the issue, we adopted a "flexible approach," generally imposing the burden of demonstrating unfairness on the petitioner. *Id.* at 220. This decision was based on two considerations. First, we are unwilling to disturb criminal convictions simply on the basis of theoretical flaws that have no real world consequences. Secondly, as a

7. We emphasize that we are faced with a *general policy* of not interviewing government witnesses. We recognize that in particular cases, an attorney's professional judgment may lead him to decline to interview some or all of the government's witnesses and to rely on other sources of information. Such an exercise of professional judgment will be given the same deference as any other.

practical matter, we recognize that proof of prejudice is usually more within the knowledge of the petitioner.

The allocation of this burden is a judicial tool designed to assist in the determination of the truth. If the particular circumstances of the case require a different allocation of the burden, that allocation will be adopted. *Cf. Wolfs* v. *Britton, supra.* Secondly, we emphasized that where the attorney's breach of duty has been serious, it is not necessary that the petitioner demonstrate by a preponderance of the evidence that adequate representation would have produced an acquittal. The petitioner need only shoulder the additional burden of showing that the alleged error itself sufficiently undercut the reliability of the trial process to have prejudiced the petitioner's right to a fair trial. As there had been no evidentiary hearing in *McQueen* directed to whether prejudice flowed from ineffective assistance of counsel, we remanded for a further evidentiary hearing. Here we have a full record. We, therefore, address the question of prejudice.

IV. *Proof of Prejudice in This Case.*

We have already held that defense counsel-Harris' failure to interview any witnesses pursuant to his absurd and dangerous general policy aganst doing so constituted a breach of an essential duty owed by counsel to petitioner. Therefore, we must consider whether the effects of that breach of duty raise a serious question as to the reliability of the trial process in this case. The Missouri Supreme Court held that the petitioner had not met his burden of showing prejudice. Relevant portions of the court's opinion are excerpted in the margin:[8]

8. Complaint is also made of [Harris'] failure to interview witnesses. There was certainly no occasion for him to interview Brown because he had decided not to use Brown as a witness in

(Continued on following page)

The question presented for our consideration requires that we examine the record to determine whether the

---

Footnote continued—

any event. There is a sound basis for the conclusion of Mr. Harris not to use Brown even if he had agreed to repudiate his confession and to testify that defendant was not involved. This because there was no direct testimony that defendant was in the cab when the crimes were committed, and it could have been very damaging to defendant for evidence to have come in (even though for purpose of impeachment) giving details of his participation in the robbery and murder. As to the two persons whom defendant said were at the home of Brown's mother-in-law, it is conceded that Harris did not interview them. There is, however, no showing that they would have been helpful to defendant. Actually, defendant's testimony would indicate the contrary. He stated he did not arrive at the house until from 30 to 45 minutes after he left the cab. The murder took place three blocks from the place where he got out. It would therefore be reasonable to conclude that those proposed witnesses would not have established an alibi for defendant.

* * *

Defendant next contends that his defense was prejudiced by the fact that the prosecutor gave false information to the court as to the illness of Frederick Brown and that he was misled thereby. What we have heretofore said will indicate our view that defendant was not prejudiced by that development. There is a reasonable basis for the view that it was to defendant's benefit that Brown did not appear as a witness. If he had testified against defendant it would have been very damaging to his defense. If he had been a witness for either the State or defendant, and had repudiated his confession involving defendant as an active participant, he could have been impeached by showing all the details of the confession as to defendant's part in the commission of the crimes. Since Mr. Harris did not intend to use Brown as a defense witness, there was no prejudice resulting from the incorrect information furnished by Mr. Fredericks. We accordingly rule this point against defendant.

* * *

The next contention of defendant is that "Judge Palumbo erred in treating Frederick Brown's credibility as an issue in the evidentiary hearing * * *." * * * It is always proper to cross-examine a witness about any relevant matter in order to test his credibility. Also, the credibility of a witness is always a proper matter for the consideration of the trial court. As we understand the trial court's finding, it was to the effect that the court did not believe Brown's testimony and hence his testimony afforded no basis for setting aside the judgment. The court did not find, as defendant seems to indicate, that a jury would not believe Brown in the event he testified at a trial on the merits. This point is therefore overruled. [512 S.W.2d at 122-23.]

absence of investigation by Thomas' counsel prejudiced the petitioner in failing to obtain a fair trial. We held in *McQueen* that

> the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. [498 F.2d at 220.]

As we have already noted, Brown has recanted his confession and supported Thomas' claim of innocence, first by an affidavit signed on November 3, 1969, almost two years after the Thomas trial. Brown supplemented his affidavit by his testimony given at the Missouri post-conviction hearings stating that Lonnie Anderson, who had followed the taxicab in an automobile, and Walter Williams,[9] who entered the cab prior to the crime, participated with Brown in Dougherty's murder. He further stated that in his confession he had implicated Thomas to cover up the participation of Williams and Anderson. He explained that he had decided to tell the truth because neither Anderson nor Williams had done anything to help him (Brown) while incarcerated. He also testified that if he had been called as a witness at the Thomas trial, he would have told the truth, *i.e.*, that Thomas was innocent.

This testimony if produced at Thomas' trial and if believed by the jury, would have mandated an acquittal. Even if Thomas' counsel had made a reasoned decision not to call Brown in order to preclude his confession as impeachment evidence, the information now uncovered would have armed Thomas' counsel with ammunition upon

---

9. Williams is now deceased.

which to cross-examine witnesses Anderson and Niles Pursley. The original trial record, which is part of the record in this case, discloses that Anderson was arrested following this crime. Pursley was another of the young men who had been with Brown at the bus station and at Brown's home the evening of the crime, and who testified for the state.

Anderson testified at the murder trial that on the day after the crime, Brown, in admitting that he had stabbed the cab driver, made no mention of Thomas' presence. *See* 512 S.W.2d 124 (dissenting opinion). At the murder trial Anderson testified that he told a police officer Brown said on entering his apartment "we stuck up a cab driver," then laughed and said "Yeah, I stabbed him."

In the statement of facts summarized *supra*, the testimony indicated that one of the other young men who had been with Brown at the bus station reported that "Brown and defendant were going to 16th and Mullanphy." Brown's post-conviction testimony indicated that Williams got in the cab at 16th and Mullanphy.

With this background, counsel for Thomas was in a position to vigorously pursue state's witnesses Anderson and Niles Pursley, determine whether Pursley's version of Brown's statement that "they robbed the cab driver" meant Brown and Thomas or Brown and one of the other young men, and to otherwise cast doubt on the prosecution's theory that Brown and Thomas remained together from the time witnesses testified to their entry into Dougherty's cab until witnesses placed them both at Brown's apartment at a later time.

Finally, knowledge of this information would have cast doubt upon defense counsel's ready acceptance of the

state's evidence[10] and should have motivated inquiry of those present at the home of Brown's mother-in-law to ascertain whether Thomas had separated from Brown at any time after the two of them got into the cab at the bus station. But attorney Harris' failure to investigate foreclosed every avenue of support for Thomas' consistent protestation of innocence, a position which partakes of some credence since at the opening of trial he declined to accept a 10-year sentence in return for a guilty plea. Harris also testified that Thomas was "very adamant in his position."

The Missouri courts and the federal district court found Brown's statement as lacking credibility—in the words of the federal district court "unbelievable." In denying relief, the district court therefore concluded:

> Under all the evidence, this Court finds that petitioner has failed to sustain his burden under *McQueen* of showing that there existed admissible evidence from witnesses "which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant . . . at the original trial."

But credibility does not constitute the standard for evaluating the evidence which could have been uncovered by an investigation.

We said in *McQueen*:

> We ought not to intervene in the criminal process unless and until it can be shown that the alleged error itself prejudiced the petitioner in obtaining a fair trial. But this is *not* to say that, on remand, petitioner must prove his innocence even by so much

10. Harris testified he knew more about the case than the defendant, Thomas, because he obtained his information from the other side.

> as a preponderance of the evidence; nor should we be understood to suggest that the Court may trespass upon what properly would have been the jury's province of weighing the truth or falsity of this evidence at the original trial. What we are saying is that, here, the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt. [498 F.2d at 220.]

The petitioner has demonstrated that reasonable investigation by Thomas' attorney could have uncovered admissible evidence which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial.[11] It cannot be said that the evidence is inherently incredible for it is supported by the accused's testimony. The uncovered evidence would be admissible upon a retrial of Thomas. True, this evidence may be considerably tainted through impeachment. But once it is shown that defense counsel breached an essential duty, the sufficiency of petitioner's proof of prejudice turns on whether admissible evidence has been uncovered which a jury could reasonably weigh in assessing

11. Obviously we cannot say with assurance that Brown *would* have told his present story to Harris had he been properly interviewed. However, in light of Brown's uncontradicted testimony that he would have told the "truth" and petitioner's insistence that the present version is the truth, viewed together with all of the other facts of this case, we are satisfied that petitioner has demonstrated a sufficient likelihood that an interview of Brown *could* have produced vital testimony.

guilt or innocence. Obviously a jury could believe all or part of the evidence here under scrutiny. Under the circumstances of this case, we cannot say that the omission of such evidence at the petitioner's trial was harmless beyond a reasonable doubt. Petitioner's proof of prejudice should not be defeated by the district court's low opinion of the credibility of relevant and admissible testimony.

HENLEY, Circuit Judge, Dissenting.

It is not the function of this court to try petitioner's habeas corpus case de novo; our function is to review the decision of the district court denying the petition, and we are required to accept the factual findings of that court unless clearly erroneous.[12] When that standard of review is applied, I cannot agree with the majority that the record in the case calls for reversal, and for that reason I dissent.

At the outset, I accept the historical facts of the case as set out in the majority opinion. I also accept the proposition that the failure of petitioner's trial counsel to interview Brown, and perhaps other persons involved in the case, cannot be justified by counsel's general policy of never interviewing prospective witnesses for the prosecution. Such a policy is certainly impermissible, regardless of what else it may be called, and I agree with the district court that by whatever standard counsel's conduct may be measured, he failed in the abstract to provide petitioner with the adequate representation of counsel that is called for by the sixth amendment to the Constitution of the United States as carried forward into the fourteenth amendment.

---

12. Fed. R. Civ. P. 52(a); *Brown* v. *Swenson*, 487 F.2d 1236 (8th Cir. 1973), *cert. denied*, 416 U.S. 944 (1974); *Taylor* v. *Swenson*, 458 F.2d 593 (8th Cir. 1972).

As the majority recognizes, however, the inquiry does not end at that point. It is also necessary to determine whether counsel's breach of duty was so prejudicial to the petitioner as to require reversal of his conviction on federal constitutional grounds.

With respect to prejudice the majority says that it was not necessary for the petitioner to demonstrate by a preponderance of the evidence that adequate representation would have produced an acquittal, and that his burden was limited to "showing that the alleged error itself sufficiently undercut the reliability of the trial process to have prejudiced the petitioner's right to a fair trial." (Slip Opinion at pp. 14-15.) And the majority also says, " . . . we must consider whether the effects of that breach of duty [to interview] raise a serious question as to the reliability of the trial process in this case." (Slip Opinion at p. 15.) For present purposes at least, I will accept the majority's definition of the burden of proof as far as prejudice is concerned.

While the majority is critical of the failure of counsel to interview the young men who were in the company of the defendant and Brown before and after the killing of Dougherty and of the failure of counsel to interview the people whom the petitioner claimed to have seen at the home of Brown's mother-in-law while he was allegedly looking for Brown, which interviews might or might not have been productive, and while the majority suggests that counsel would have done well to have tried to locate certain cab drivers who, if they had been found, might or might not have supplied information helpful to the defense, it seems to me that the majority's decision on the issue of prejudice is based ultimately on the failure of counsel to interview Brown himself while Brown was confined in jail in St. Louis.

The majority is of the view that had Brown been interviewed, he perhaps would have recanted that part of his confession which implicated petitioner in the murder, and that such a recantation would have been of substantial help to petitioner at his trial regardless of whether or not Brown was called as a witness for either side.

Although the majority concedes that it cannot be said with assurance that Brown would have made such a recantation had he been interviewed by counsel (Slip Opinion at p. 21, first sentence, and n. 11 appearing on that page), nevertheless, the majority is of the view that the possibility of such a partial recantation was strong enough to cause the failure of counsel to interview Brown to result in a serious undercutting "of the reliability of the trial process which prejudiced petitioner's right to a fair trial." It is at this point that I disagree with the majority.

In my opinion, to say that there was a strong possibility, to say nothing of a probability, that Brown would have exculpated petitioner had Brown been interviewed by counsel, is to engage in pure speculation. And I do not think that a conviction, the validity of which has twice been considered by the Supreme Court of Missouri, in post-conviction proceedings and which has also been considered carefully by the district court should be overturned on such a basis.

Recantations of confessions and changes of story by convicts months or years after their convictions are by no means unusual. There are many motives for such recantations and changes, and they are highly untrustworthy.

I do not think that the Missouri courts were required or that the federal district court was required to accept or give any great weight to Brown's belated affidavit and

post-conviction testimony, including his statement that if he had been interviewed while in jail and had been called as a witness, he would have absolved petitioner of any involvement in the robbery and killing of the cab driver.

It must be remembered that Brown kept silence for some two years after petitioner was convicted. He explained his silence by saying that he expected help of an unspecified kind from two alleged accomplices, Anderson and Williams, the latter of whom is now dead, and that he decided to tell the truth after he became convinced that they were not going to afford him any help whether legitimate or illegitimate.

It cannot be ascertained at what point in time, if ever, Brown became convinced that he was not going to receive any help from Anderson and Williams, but the fact that he kept silence for two years justifies the inference that he was harboring his hope of assistance for a substantial period of time after petitioner's trial and conviction, and there is simply no real reason to believe that he would have changed his original story had petitioner's attorney talked to him before petitioner's trial.

Let it be assumed, however, that Brown would have recanted had he been interviewed by counsel. While such recantation may have been of some value to defense counsel in cross-examining prosecution witnesses, it is clear that the most obvious help that Brown could have given petitioner would have been to take the stand and tell the jury that petitioner had left the cab before the killing and had nothing to do with it.

The trouble with that from petitioner's standpoint is that apart from Brown the State had no witness that could from his own knowledge place petitioner in the cab when the driver was killed, and in fact the State

was not able to place petitioner in the cab at the time of the killing by means of direct evidence. Had Brown been called as a witness, and had he exculpated petitioner, the State would have impeached him immediately by reference to his confession. Had the defense called Brown, it would have run the risk that the jury would not accept the recantation, and the jury would have gone to its deliberations with knowledge that Brown had implicated petitioner originally. The State did not call Brown, and when it failed to do so, it took a serious risk that the jury would not be convinced of the petitioner's guilt on the strength of testimony of the witnesses who were called. That risk might well have been eliminated from a practical standpoint had Brown been called as a defense witness; moreover, had the defense called Brown, it would have taken a serious risk that Brown would recant his recantation and would testify directly that petitioner participated in the robbery that resulted in the killing.

What has been said to this point sufficiently states my views as far as the result of this particular case is concerned. I would affirm. However, in view of the recurrence of post-conviction contentions of inadequate representation by counsel at original trials, the advancing of which has become a standard operating procedure for convicts, and which are most troublesome to judges and embarrassing to the attorneys involved, I feel it desirable to go somewhat beyond this case.

The focus of discussion here has been as to whether or not petitioner sustained prejudice as a result of his attorney's dereliction of duty. However, it is clear from the unpublished opinion of District Judge Nangle that he had some trouble with the standard to be applied in determining whether or not there had been a breach of duty by petitioner's counsel; and he called attention to

a number of our decisions which, to use his term, make the applicable standard "a bit unclear." The cases cited were: *DeBerry* v. *Wolff*, 513 F.2d 1336 (8th Cir. 1975); *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir. 1975); *Johnson* v. *United States*, 506 F.2d 640 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975); *Crenshaw* v. *Wolff*, 504 F.2d 377 (8th Cir. 1974), *cert. denied*, 420 U.S. 966 (1975); *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974); and *Cardarella* v. *United States*, 375 F.2d 222 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967).

This writer also had trouble with the applicable standard in cases that he considered while on the district bench. In *Frazier* v. *Roberts*, 310 F.Supp. 504, 512 (E.D. Ark. 1970), the writer cited with approval the then recent case of *Scalf* v. *Bennett*, 408 F.2d 325 (8th Cir.), *cert. denied*, 396 U.S. 887 (1969), wherein it was held, 408 F.2d at 327-28, that habeas corpus relief would not be granted on account of incompetency of counsel or denial of effective counsel unless the trial was a farce or mockery of justice, or was shocking to the conscience of the reviewing court, or unless the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.[13]

A few years later, the writer thought, largely on the strength of *McQueen* v. *Swenson*, *supra*, that the standard announced in *Scalf* v. *Bennett*, *supra*, had been replaced by a "reasonable competency" standard such as had been adopted in other circuits. *Clark* v. *Lockhart*, 379 F.Supp. 1320, 1329 (E.D. Ark. 1974), *aff'd*, 512 F.2d 235 (8th Cir. 1975), *cert. denied*, ... U.S. ..... (1976).[14]

---

13. *Frazier* v. *Roberts*, *supra*, was reversed by this court, 441 F.2d 1224 (8th Cir. 1971). However, this court did not refer to the standard of representation mentioned by the district court.

14. Again, this court did not discuss the standard employed by the district court.

Post-*McQueen* cases mentioned by the district court and in the majority opinion of this court indicate that we may have returned to the "farce and mockery of justice" standard of the older cases if, indeed, we ever departed from it, and that we are at least paying lip service to that standard. I fear, however, that what we may really be doing is deciding cases of this kind by hindsight, on a purely ad hoc basis, and without any real reference to any particular standard of the quality of representation constitutionally required or relating to the extent of prejudice that will require a reversal if representation has been inadequate constitutionally. Such an approach, if it is being taken, is in my view undesirable and unfair to district judges, to state courts, and to lawyers who represent defendants in criminal cases.

I recognize that it is extremely difficult to articulate general standards to be applied in this area, and I also recognize that whether a given representation has been constitutionally inadequate and, if so, whether the inadequacy has so prejudiced the defendant as to call for a reversal, must necessarily depend upon a number of factors which vary from case to case. But, I also think that a district judge called upon to decide a case of this kind should have some guidelines to follow, and some assurance as to how his decision will be reviewed on appeal.

In my opinion, the standard laid down in *Cardarella* v. *United States, supra,* as amplified to some extent in *Scalf* v. *Bennett, supra,* is an adequate and proper standard to be followed in appraising the constitutional adequacy of representation by counsel in a given case. And I think that this court should announce its adherence to that standard, or to some other standard if the court prefers, and that thereafter we should confine ourselves to exercising our proper appellate function in reviewing de-

cisions of the district court in cases in which they have been called upon to apply that standard. On the other hand, it behooves the district courts to make it clear in their findings or opinions that they have considered the question before them in the light of the prescribed standard.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX 4

IN THE
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 75-1699

SANFORD THOMAS,
Appellant,

vs.

DONALD WYRICK,
Appellee.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR REHEARING EN BANC

COMES NOW the appellee, Donald Wyrick, by the Honorable John C. Danforth, Attorney General, State of Missouri, and hereby petitions this Court for a rehearing before Division I, or in the alternative, for a rehearing before the Court en Banc; and in support of such petition

contends the Court improperly found appellant was prejudiced by misconstruing past case law of this Court.

WHEREFORE, the appellee requests this Court to rehear this cause, or to transfer the case en banc for rehearing.

Respectfully submitted,

John C. Danforth
Attorney General

/s/ Neil MacFarlane by Preston Dean
Neil MacFarlane
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Appellee

I hereby certify that the foregoing Petition for Rehearing was served by mailing a true copy thereof, postage prepaid, this 18th day of May, 1976, to:

Jack M. Chasnoff,
Tucker & Chasnoff,
7701 Forsyth Boulevard,
Clayton, Missouri 63105.

/s/ Neil MacFarlane by Preston Dean
Neil MacFarlane

IN THE
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 75-1699

SANFORD THOMAS,
Appellant,

vs.

DONALD WYRICK,
Appellee.

SUGGESTIONS IN SUPPORT OF PETITION

In its Opinion this Court noted the district court was somewhat puzzled as to the correct standard to be used in considering the petitioner-appellant's claim of ineffective assistance of counsel. After much discussion of the proper standard, this Court simply stated the recent case of *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974), reaffirmed the traditional "farce or mockery" standard. However, what is more important is that this Court, perhaps encouraged by the similar practice followed by the defense counsel in both this case and *McQueen* of not interviewing state witnesses, adopted the standard set forth in *McQueen*. That standard, wisely, in the opinion of appellee, holds a convicted person is not entitled to relief simply by showing his counsel failed to perform some duty. He also must establish that he was prejudiced. In the words of the *McQueen* court, the test is:

> "Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: First, determining, as we have already done, whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense counsel to his client; and second, as will be done on

remand, whether that failure prejudiced his defense." 498 F.2d 218.

While both the majority and dissenting opinions found petitioner's defense counsel failed to provide constitutionally adequate representation, the appellee disagrees and contends defense counsel's failure to interview witnesses, his one act or omission relied on by this Court, was not critical because of the circumstances of this case. Appellee recognizes the defense counsel had a "general policy" of not interviewing state witnesses. But, this Court, after recognizing the dangers of such policy and warning against its use, admitted there are particular cases where an attorney need not interview witnesses to provide constitutional representation. This Court then found defense counsel's adherence to the "general policy" constituted ineffective representation, without measuring the facts involved to determine if this is a case where interviewing witnesses is not required.

However, rather than further discuss the question of whether or not defense counsel was effective, the appellee believes this case should be reheard, contending this Court erroneously found prejudice, as it evidently did by the following statement:

> "The petitioner has demonstrated that reasonable investigation by Thomas' attorney could have uncovered admissible evidence which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial." (Slip Opinion, 21.)

And, in making such finding, the appellee contends this Court has misconstrued the very ruling it states it was following, the ruling set forth in *McQueen* v. *Swenson, supra*. Just before setting forth the above finding, the Court

quoted from *McQueen*, part of that quote being as follows:

> "What we are saying is that, here, the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant, either on cross-examination or in his case-in-chief at the original trial." 498 F.2d 220.

The appellee contends there are two critical parts of such test which the reasoning of this Court fails to meet. First, the petitioner must show the *existence* of useful evidence, and once he has established such evidence existed, he must prove it would have been *helpful*.

In analyzing whether or not petitioner met his burden, this Court considered the three groups of witnesses that the petitioner contends his attorney should have interviewed. They are: (1) Frederick Brown, the person who pleaded guilty to murdering the cab driver and who stated in his confession that petitioner was with him; (2) the young men who were with Brown and petitioner before and after the killing, including Lonnie Anderson and Niles Pursley; and (3) Brown's wife and her cousin, the people at the home of Brown's mother-in-law, which petitioner contends he visited after he left the cab upon learning that Brown intended to rob the cab driver.

The appellee agrees with the dissenting opinion that the majority opinion relied primarily on defense counsel's failure to interview Brown to find that petitioner was prejudiced. In order to concentrate more heavily on that most serious allegation of prejudice, the appellee will discuss defense counsel's failure to interview those three groups of witnesses in reverse order.

First, there is a question of whether the people at the house of Brown's mother-in-law should have been interviewed by defense counsel. The majority opinion states on p. 5 that two individuals were at that house, Brown's wife and her cousin. The Supreme Court of Missouri, sitting en banc after petitioner appealed following his second evidentiary hearing on his motion under Missouri Supreme Court Rule 27.26, met this issue as follows:

> "As to the two persons whom defendant said were at the home of Brown's mother-in-law, it is conceded that Harris did not interview them. There is, however, no showing that they would have been helpful to defendant. Actually, defendant's testimony would indicate the contrary. He stated he did not arrive at the house until from 30 to 45 minutes after he left the cab. The murder took place three blocks from the place where he got out. It would therefore be reasonable to conclude that the proposed witnesses would not have established an alibi for defendant." 512 S.W.2d 122 (Mo. Banc 1974).

At most, those persons could have corroborated petitioner's story, but because of the timing involved, would not have provided an alibi. To understand such corroboration, one need look only at the majority opinion which stated petitioner testified those persons would have confirmed his story that he came alone to that house looking for Brown. The appellee contends such claim by petitioner falls far short of the existence requirement of the *McQueen* test. For anyone to state that Brown's wife and her cousin would have so testified is pure speculation. What appellee believes is very important, and something which this Court has ignored, is that petitioner was granted two evidentiary hearings pursuant to his 27.26 motion in state court, and did not produce Brown's wife or her cousin to testify

as he claimed they would. Moreover, there was no claim of such new evidence made in the lower court in hopes of gaining an evidentiary hearing in the federal arena and, in fact, no direct request for an evidentiary hearing at all. The district court accepted the state court hearing proceeding, finding they met federal standards.

In summary, for anyone to claim the persons at the home of Brown's mother-in-law would have testified in support of petitioner is pure speculation, and does not meet the *McQueen* standard.

The same is true with respect to petitioner's claim that his attorney should have interviewed the group of young men who were with petitioner-appellant and Brown before and after the incident. To suggest any of them could have testified in support of petitioner is totally speculative. In fact, two of them, Lonnie Anderson and Niles Pursley, testified for the state at the trial. The testimony of neither was helpful to petitioner, and to suggest that either could have aided petitioner if his counsel had interviewed them is purely speculative.

Finally, we arrive at what the dissenting opinion believes the majority relied on primarily to find prejudice, defense counsel's failure to interview Frederick Brown. As stated above, Brown confessed to murdering the cab driver, and in his confession implicated petitioner as being involved. The following detail of facts can be found in the dissenting opinion of the last Missouri Supreme Court opinion, as follows:

> "The facts are that Brown pleaded guilty on October 17, 1967, and remained in the City Jail until November 9, 1967, when he entered the penitentiary. The trial of defendant Thomas (petitioner) did not commence until November 13, 1967, so Harris had ample

time in which to interview Brown and find out whether Brown was really going to stand by his statement that Sanford Thomas was involved, which is the only way it could be determined if Brown should be used as a witness in Thomas' behalf despite the statement." 512 S.W. 116.

The most striking, and perhaps the most important, evidence presented by petitioner at his 27.26 hearing was testimony by Brown. Brown recanted his confession to the effect of petitioner being involved. But, as this Court candidly admitted, Brown did not recant his confession until two years after petitioner was convicted. But, this Court's Opinion suggests that Brown would have recanted his confession at the time of petitioner's trial if called on to testify. To do so clearly ignores appellee's testimony at his two 27.26 evidentiary hearings, transcripts of which were filed in the court below as Exhibits A and C. At both times, petitioner testified that while he was in jail he attempted to discuss the case with Frederick Brown, but that Brown refused to talk with him about it (Exhibit A, 143-144, and Exhibit C, 142). Under such circumstances, it is certainly quite doubtful Brown would have testified that petitioner was not involved at the time of petitioner's trial.

What appellee further finds totally unbelievable is Brown's reason for recanting his confession. He contends he implicated the petitioner to cover up the participation of Williams and Anderson. Because there were no eyewitnesses, and no direct testimony putting more than one person in the cab with the victim, appellee wonders why Brown felt it was necessary to cover up the alleged participation by any accomplice. As this Court pointed out, Williams is, as one might expect, now deceased. Further, Anderson's participation was simply following the cab in

another automobile. The appellee contends Brown's reason for recanting his confession is most illogical, and falls far short of even suggesting that he might have recanted his confession at the time of petitioner's trial simply if interviewed by defense counsel, when at that very time he would not talk to petitioner while in the same jail.

However, the appellee contends there is a much more important issue concerned with defense counsel's failure to interview Frederick Brown. Under the McQueen test, petitioner has the burden of establishing the *existence* of *helpful* evidence. Even if we assume Brown would have recanted his confession prior to petitioner's trial, the question here is not one of existence, because defense counsel would not have used such evidence. As defense counsel made clear at the two 27.26 evidentiary hearings, he would not have called Brown as a witness because of that person's confession implicating petitioner, and was most happy when Brown did not appear. For example, he was questioned as to whether or not he intended to call Frederick Brown and stated:

> "I didn't deem it at all wise to use Brown in light of that statement, because we knew nothing except what was in that statement as to what Brown would testify to with respect to Thomas' participation. *Assuming he would change his story I did not think it would help to have it before the jury. I did not expect to use him, no, no.*" (Exhibit C, 146.) (Emphasis added.)

One might argue such statement was inconsistent with defense counsel's objection to the action of the state in withdrawing Frederick Brown as a witness during the trial, but he was questioned about this apparent inconsistency during the second 27.26 proceeding, and stated:

"Yes, I had mixed emotions. Of course, you can't tell the other side, but I was happy he wouldn't be here because I knew about the confession we would be confronted with, and I had to put up a front and act surprised, which I did, when he said he wouldn't be here. But, I wasn't going to oppose it and be the one to bring him in with a confession staring us in the face." (Exhibit A, 166.)

It is most clear defense counsel's decision not to use Brown was a trial tactic, not the result of his failure to interview Brown.

On p. 11 of the majority opinion, this Court states:

"However, despite the importance of a showing that a defendant is not denied adequate assistance of counsel, we emphasize that 'there is and should be a presumption that counsel is competent,' *id.* at 216, and we reiterated the 'sound precept' that 'the existence of a defense attorney's professional judgment should not be second-guessed by hindsight.' "

In spite of this statement, the appellee contends this Court has second-guessed the professional judgment of petitioner's attorney, Alfred Harris. Harris was well aware of Brown's confession. He did not intend to call Frederick Brown as a witness, because by doing so that person's confession in which Brown incriminated the petitioner, would come before the jury. A perusal of the trial transcript makes it clear there was no direct evidence of petitioner's involvement in the robbery and murder, although his "friends" testified he left the bus station in the victim's cab with Frederick Brown, and the two arrived together at Brown's house. Defense counsel Harris knew that if he put Brown on the stand, Brown would either restate or recant his confession. If he testified in line

with his confession, petitioner's chances were doomed. If he recanted his confession, he would be severely impeached by the confession, and the jury would have a form of direct evidence of petitioner's involvement in the robbery and murder.

This Court stated defense counsel Harris would have been "in a position to vigorously" cross-examine Lonnie Anderson and Niles Pursley about what the majority claims were Brown's statement that "they robbed the cab driver," about whether petitioner and Brown remained together all the time, if he had the background the Court set forth or *suggested* in the majority opinion. Also, this Court contends such knowledge would have "motivated inquiry of those present at the home of Brown's mother-in-law."

The appellee points out that Anderson Pursley did not remember who made the specific statement, even though such information was pursued by Alfred Harris in his cross-examination of that witness. 440 S.W.2d 468. Anderson did admit he had told the police Brown made a statement very similar.

Further, appellee finds nothing in "this background" that would have aided defense counsel. Harris had, of course, talked with petitioner, obviously receiving petitioner's story. Therefore, Harris knew petitioner's claim that he left the cab upon learning Brown's plans, that he went to the home of Brown's mother-in-law, and the two met before reaching Brown's house, and entered together. What could defense counsel have discovered, as the majority feels is now known, except for Brown's claim that he would have recanted his confession at that point? Nothing. And defense counsel would not have used Brown anyway.

Furthermore, besides Brown's recantation and petitioner's story that he should and certainly did tell defense counsel all "background" material is pure speculation.

In summary, the appellee contends petitioner has not met the *McQueen* test requirements. He has not shown the *existence* of *helpful* evidence, with one small exception. He has established that Frederick Brown recanted his confession, and had Brown testify he would have recanted his confession at the time of petitioner's trial. However, the existence element is not important with respect to this evidence, because Brown's testimony would not have been used at petitioner's trial because defense counsel exercised his professional judgment and felt that such evidence would be harmful, even if it could be guaranteed that Brown would recant his confession at that time. Therefore, the appellee believes this Court has reversed the decision of the court below because it disagrees with defense counsel's professional judgment, not because petitioner met his burden of showing the existence of helpful admissible evidence that his counsel failed to discover. In addition, much of the majority opinion concerns not the existence of helpful evidence, but pure speculation that such evidence exists.

Respectfully submitted,

John C. Danforth
Attorney General

/s/ Neil MacFarlane by Preston Dean
Neil MacFarlane
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Appellee

I hereby certify that the foregoing Suggestions were served by mailing a true copy thereof, postage prepaid, this 18th day of May, 1976, to:

Jack M. Chasnoff,
Tucker & Chasnoff,
7701 Forsyth Boulevard,
Clayton, Missouri 63105.

/s/ Neil MacFarlane by Preston Dean
Neil MacFarlane

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1975

No. 75-1699

Sanford Thomas,
Appellant,

vs.

Donald Wyrick, Warden, Etc.
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

ORDER

(Filed May 28, 1976)

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premised, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 28, 1976

APPENDIX 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 74-539 C (4)

SANFORD THOMAS,
Petitioner,

vs.

DONALD WYRICK,
Respondent.

ORDER

(Filed June 8, 1976)

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, which reached this Court on June 7, 1976,

IT IS HEREBY ORDERED that the State of Missouri shall have ninety (90) days from this date to re-try petitioner Sanford Thomas on the indictment herein involved or a writ of habeas corpus shall issue.

/s/ John P. Nangle
United States District Judge

Dated: June 8, 1976.

APPENDIX 7

IN THE
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 75-1699

SANFORD THOMAS,
Appellant,

vs.

DONALD WYRICK,
Appellee.

MOTION FOR COURT TO RECALL ITS MANDATE, AND TO STAY ISSUANCE OF SAID MANDATE PENDING APPELLEE'S APPLICATION TO THE SUPREME COURT FOR A WRIT OF CERTIORARI

COMES NOW the appellee, Donald Wyrick, by the Honorable John C. Danforth, Attorney General, State of Missouri, and moves this Court to recall its mandate and stay issuance of the mandate pending appellee's application to the Supreme Court for a writ of certiorari.

WHEREFORE, the appellee requests this Court to recall its mandate, and to stay issuance of the mandate,

for 30 days to allow appellee to apply to the Supreme Court for a writ of certiorari.

Respectfully submitted,

John C. Danforth
Attorney General

/s/ Neil MacFarlane by Preston Dean
Neil MacFarlane
Asssistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Appellee

I hereby certify that the foregoing Motion was mailed, postage prepaid, this 9th day of June, 1976, to:

Jack M. Chasnoff,
Tucker & Chasnoff,
7701 Forsyth Boulevard,
Clayton, Missouri 63105.

/s/ Preston Dean
Preston Dean

IN THE
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 75-1699

SANFORD THOMAS,
Appellant,

v.

DONALD WYRICK,
Appellee.

SUGGESTIONS IN SUPPORT OF MOTION FOR RECALL

This Court based its reversal, and direction to the district court below, on its holding that petitioner's trial counsel was ineffective because of his failure to interview the state's witnesses. And, that if petitioner's trial counsel had interviewed the state's witnesses, this Court feels he would have learned the facts as set forth in its Opinion, and, more importantly, would have been ". . . in a position to vigorously pursue state's witnesses Anderson and Niles Pursley . . .". Also, such knowledge would ". . . have motivated inquiry of those present at the home of Brown's mother-in-law." This Court has stated petitioner's trial counsel would have been in a better position to investigate. But the ruling that such investigation, as suggested in the opinion, would be favorable to the petitioner is pure speculation.

These suggestions by the Court came after it had discussed the various cases setting forth the applicable standard for measuring whether or not counsel is effective, which resulted in allegiance to the case of *McQueen* v.

Swenson, 498 F.2d 207 (8th Cir. 1974). In that case, this Court stated:

> "Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: First, determining, as we have already done, whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense counsel to his client; and second, as will be done on remand, whether that failure prejudiced his defense." 498 F.2d 218.

Shortly thereafter, this Court addressed the question of who has the burden of proving whether counsel's failure to perform some duty prejudiced the defense by stating:

> "What we are saying is that, here, the petitioner must shoulder an additional burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant, either on cross-examination or in his case-in-chief at the original trial." 498 F.2d 220.

This Court erroneously found the petitioner met his burden of establishing prejudice, as is evident from the above quotes, and from the following statement:

> "The petitioner has demonstrated that reasonable investigation by Thomas' attorney could have uncovered admissible evidence which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial." Slip Opinion, 21.

As appellee stated in his suggestions and motion for rehearing, this Court considered the three groups of witnesses that petitioner contends his attorney should have interviewed. Again, they are: (1) Frederick Brown, the person who pleaded guilty to murdering the cab driver and who stated in his confession that petitioner was with him; (2) the young men who were with Brown and petitioner before and after the killing, including Lonnie Anderson and Niles Pursley; and (3) Brown's wife and her cousin, the people at the home of Brown's mother-in-law, which petitioner contends he visited after he left upon learning Brown intended to rob the cab driver.

Petitioner has not established prejudice by the failure of his counsel to interview Brown. While that person did recant his confession two years after petitioner was convicted, it is obvious petitioner's counsel knew of the confession and was well aware Brown would be thoroughly impeached if his testimony were inconsistent with that confession. It is obvious to the writer the introduction of Brown's confession, which is the only direct evidence of petitioner's involvement, would be disastrous to the petitioner. In other words, petitioner's defense counsel, a frequent attorney in the criminal courts of the City of St. Louis made the wise decision of choosing not to use Brown because of the confession. The state did not, of course, use the confession. If, however, Brown testified and recanted his confession, it certainly would have come into evidence. Defense counsel's failure to interview Frederick Brown was a trial tactic or trial strategy, and as this Court said at p. 216 of the McQueen Opinion, ". . . the exercise of a defense attorney's professional judgment should not be second-guessed by hindsight."

The respondent further contends petitioner has failed to show prejudice from his defense counsel's failure to

interview the other two groups of witnesses mentioned by this Court. This Court stated:

> "First, we are unwilling to disturb criminal convictions simply on the basis of theoretical flaws that have no real-world consequences." Slip Opinion, 14.

However, this Court then holds that petitioner established prejudice by stating his counsel would have been in a better position to interview Lonnie Anderson and Niles Pursley, and such information would have prompted defense counsel to interview those persons who had been at the home of Brown's mother-in-law. Again, this does not show prejudice. It is pure speculation to suggest that helpful or useful evidence would have been established. It should further be noted petitioner has had two opportunities to produce helpful evidence, but has not done so. He was granted an evidentiary hearing in the state court's post-conviction proceedings, and his counsel, when queried about whether an evidentiary hearing was necessary by the federal district court below, replied that he had no new evidence.

In summary, the appellee contends this Court has eviscerated its opinion in *McQueen* v. *Swenson* by ruling petitioner is entitled to a writ of habeas corpus when petitioner has not shown the existence of any helpful evidence, which is necessary to show prejudice under the *McQueen* doctrine. This Court found petitioner has established prejudice simply by ruling his counsel would have been in a better position to interview the witnesses. For the third time, the appellee contends this is nothing more

than pure speculation, far short of prior rulings by this court.

Respectfully submitted,

John C. Danforth
Attorney General

/s/ Neil MacFarlane by Preston Dean
Neil MacFarlane
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Appellee

I hereby certify that the foregoing Motion was mailed, postage prepaid, this 9th day of June, 1976, to: Jack M. Chasnoff, Tucker & Chasnoff, 7701 Forsyth Boulevard, Clayton, Missouri 63105.

/s/ Preston Dean
Preston Dean

APPENDIX 8

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1975

75-1699

Sanford Thomas,
Appellant,

vs.

Donald Wyrick, Warden, Missouri State Penitentiary,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Appellee's motion to recall mandate is denied without prejudice to appellee's right to seek a stay for further proceedings from the Supreme Court of the United States pending application for writ of certiorari.

June 16, 1976